



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: OMNI International Distributors, Inc.

File: B-224027.5

Date: December 8, 1987

DIGEST

1. Agency did not abuse its discretion by requesting best and final offers after reopening negotiations pursuant to recommendation by the General Accounting Office.
2. Allegation first raised in comments on the agency report is untimely where not filed within 10 working days of when the basis for the allegation was known or should have been known; separate grounds of protest asserted after a protest has been filed must independently satisfy the timeliness requirements of Bid Protest Regulations.

DECISION

OMNI International Distributors, Inc., protests the award of a contract to Climb High Inc. under request for proposals (RFP) No. DAKF31-86-R-0138, issued by the Department of the Army for ski bindings. We deny the protest.

In June 1986, the Army issued solicitations for various kinds of ski equipment, including ski bindings. When the contract for ski bindings was awarded to OMNI, two other offerors, East Norco Joint Venture and Ramer Products Ltd., protested the rejection of their proposals as technically unacceptable. In East Norco Joint Venture, et al., B-224022, et al., Jan. 5, 1987, 87-1 CPD ¶ 6, aff'd, Department of the Army, et al., B-224022.2, et al., Apr. 9, 1987, 87-1 CPD ¶ 389, we sustained the protests on the basis that the Army had acted improperly by requesting samples from OMNI while evaluating Ramer and Norco on the basis of previously-purchased bindings that Ramer's proposal indicated had been specifically modified in critical areas. We recommended that the agency "extend to Ramer and Norco the same opportunity it afforded OMNI of submitting samples of the bindings that they are proposing If appropriate, the Army should terminate the protested contract and award a new one."

040793

The Army thereupon solicited samples from, and opened negotiations with, all of the original offerors, including those, such as Climb High, whose initial proposals had previously been found technically unacceptable. As a result of discussions, the agency determined that its previous evaluation of Climb High's proposal was in error. After receipt of best and final offers (BAFOs), the agency terminated its contract with OMNI for the convenience of the government and made award to Climb High on August 18. OMNI then filed this protest with our Office.

Noting that our recommendation for corrective action did not specifically call for the Army to request a round of BAFOs, OMNI contends that the agency's request created an impermissible auction under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(d) (1986), because the prices initially offered by OMNI and several of the other offerors, but not Climb High, had been disclosed during the prior bid protests. Further, OMNI claims that it was unaware that the agency had requested a BAFO from Climb High, since that firm's initial proposal had been found technically unacceptable; had it known of Climb High's participation in the reopened negotiations, OMNI states, it would have offered a different BAFO.

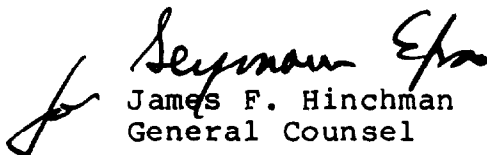
The details of implementing one of our recommendations for corrective action are within the sound discretion and judgment of the contracting agency. Furuno U.S.A., Inc.--Request for Reconsideration, B-221814.2, June 10, 1986, 86-1 CPD ¶ 540. Here, the Army's reopening of discussions to review offerors' bid samples was consistent with our recommendation and well within the agency's discretion. Where such discussions are held, offerors must be afforded an opportunity to submit revised proposals. See FAR, 48 C.F.R. § 15.610(c)(5). See Pan Am Support Services, Inc.--Request for Reconsideration, B-225964.2, May 14, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 512; Roy F. Weston, Inc.--Request for Reconsideration, B-221863.3, Sept. 29, 1986, 86-2 CPD ¶ 364. In any case, possible prejudice to OMNI from the exposure of its original offer was ameliorated by the passage of time (approximately 1 year) between the submission of the original offer, July 1986, and the new closing date for receipt of BAFOs, July 20, 1987. As for OMNI's claim that it was unaware that Climb High had been included in the competitive range for purposes of the new BAFOs, this provides no basis for questioning the award, since the procurement regulations generally prohibit an agency from disclosing the identity of other offerors. FAR, 48 C.F.R. § 15.413.

In comments on the agency report filed on October 19 and additional comments filed on November 12, OMNI alleged for

the first time that: (1) the Army acted improperly in considering for award an offeror--Climb High--whose initial proposal originally had been found to be technically unacceptable; (2) Climb High's proposed ski bindings failed to conform to certain mandatory solicitation requirements concerning the release mechanism for separating the boot from the ski in the event of an accident; and (3) the agency improperly failed to consider the cost of terminating OMNI's contract when evaluating BAFOs.

Our Bid Protest Regulations require that protests be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1987). New and independent grounds of protest asserted after a protest has been filed must independently satisfy the timeliness requirements. Universal Shipping Co., Inc., B-223905.2, Apr. 20, 1987, 87-1 CPD ¶ 424. We stated in our prior decisions that all of the proposals except those of OMNI and another offeror (other than Climb High) had been found to be technically unacceptable. In its initial August 26 protest of the award to Climb High, OMNI alleged that the ski bindings offered by Climb High did not meet a mandatory specification; although subsequently abandoned, this allegation indicates that OMNI was aware of the ski bindings being offered by Climb High, and thus of the basis for an allegation that they did not meet other specifications, no later than the filing of its initial protest. Likewise, since OMNI had not filed a claim for termination costs when award was made to Climb High, OMNI knew or should have known when it filed its initial protest that the agency had not considered termination costs in evaluating BAFOs. Accordingly, these additional grounds of protest, first raised more than 10 working days after OMNI knew or should have known the basis for them, are untimely.

The protest is denied.


James F. Hinchman
General Counsel